Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 834

THE STATE OF NEW JERSEY and the PRINCIPAL KEEPER OF THE STATE PRISON AT TRENTON, NEW JERSEY,

Petitioners,

vs.

UNITED STATES OF AMERICA, *ex rel.* ANTHONY RUSSO and UNITED STATES OF AMERICA, *ex rel.* FRANK BISIGNANO,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITIED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING A WRIT OF CERTIORARI	4
POINT I—The decision rendered by the Third Circuit Court of Appeals involved an erroneous application and expansion of the Sixth Amendment to the United States Constitution as expressed by this Court in Escobedo v. Illinois and has thus established a new rule of law and settled an important issue of Federal Constitutional Law which has not been, but should be, determined by this Court	5
POINT II—Assuming that the Court below properly extended the ruling in Escobedo v. Illinois it should not be applied retroactively to criminal cases in which conviction and direct appellate review have been concluded	17
POINT III—The decision below conflicts with that of other federal and state courts in regard to both the courts interpretation of Escobedo v. Illinois and its retroactive effect	22
CONCLUSION	25

PAGE

Cases Cited

Bisignano v. New Jersey, 374 U. S. 852 (1963) 6

Cephus v. United States, —— F. 2d —— (D. C. Cir. 1965) 23

Commonwealth v. Negi, —— Pa. ——, 213 A. 2d 670 (1965) 23, 24

Davis v. State of No. Carolina, 339 F. 2d 770 (4th Cir. 1964) 22

Edwards v. Holman, 342 F. 2d 679 (5th Cir. 1965) 22, 23

Escobedo v. Illinois, 378 U. S. 478 (1964) ... 2, 4-15, 17, 21-24

Gideon v. Wainwright, 372 U. S. 335 (1963) 6, 11, 17, 18, 20, 22

Illinois v. Hartgreaves, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), cert. denied, 380 U. S. 961 (1965) 23

Linkletter v. Walker, 381 U. S. 618 (1965) 17-19, 21, 22

Lopez, In re, 42 Cal. Rptr. 188, 398 P. 2d 380 (1965) .. 22, 23

Mapp v. Ohio, 367 U. S. 643 (1961) 14, 17-19, 21

Massiah v. United States, 377 U. S. 201 (1964) 6

McDonald v. U. S., 335 U. S. 451 (1948) 14

People v. Dorado, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965) 21

Powell v. Alabama, 287 U. S. 45 (1932) 18

State v. Coleman, 46 N. J. 16, —— A. 2d —— (1965) .. 23, 24

State v. Johnson, 43 N. J. 572 (1965) 18, 19, 23, 24

State v. LaPierre, 39 N. J. 156 (1963) 3, 6

Sturgis v. Maryland, 235 Md. 343, 201 A. 2d 681 (1964) 23

PAGE

Timmons v. Peyton, 240 F. Supp. 749 (E. D. Vir. 1965) 23

United States v. Childress, 347 F. 2d 448 (7th Cir. 1965) 23

United States v. Cone, —— F. 2d —— (2nd Cir. 1965) 23

United States v. Drummond, —— F. 2d —— (2nd Cir. 1965) 23

United States v. Robinson, —— F. 2d —— (2nd Cir. 1965) 23

United States, ex rel. Conroy v. Pate, 240 F. Supp. 237 (N. D. Ill. 1965) 23

United States, ex rel. Townsend v. Ogilvie, 334 F. 2d 837 (7th Cir. 1964), cert. denied, 379 U. S. 984 (1965) 23

Walden v. Pate, —— F. 2d —— (7th Cir. 1965) 23

Wolf v. Colorado, 338 U. S. 25 (1949) 19, 21

United States Constitution Cited

Fifth Amendment 3, 5, 11, 12

Sixth Amendment 2, 3, 5, 6, 12, 13, 15, 17

Fourteenth Amendment 19, 20

Statute Cited

28 U.S.C.:

Sec. 1254(1) 2

Other Authority Cited

Israel, "Gideon v. Wainwright: The 'Art of Overruling,'" The Supreme Court Review (1963):

211 20

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Opinions Below

The opinions of the United States Court of Appeals for the Third Circuit, printed in the Appendix of Petitioners (P1a to 30a) are reported in 351 F. 2d 429 (3 Cir. 1965).

Jurisdiction

The United States Court of Appeals for the Third Circuit entered judgment in this case on May 20, 1965. The State of New Jersey filed a petition for rehearing on June 1, 1965. The Attorney General of New Jersey, *amicus curiae*, filed a brief in support of the petition for rehearing. The petition was denied on October 13, 1965.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the rule of *Escobedo* v. *Illinois* require the suppression of free and voluntary confessions made to law enforcement officers by persons questioned about or suspected of crimes, who have neither requested nor been refused counsel, solely because the investigating authorities did not advise such persons of their right to remain silent, of the fact that anything they said might be used in evidence or of their right to consult with counsel, where there has been no denial of substantial justice, fair treatment or due process?

2. Is the decision in *Escobedo* v. *Illinois* as extended by the Court below to be applied retroactively with respect to judgments of convictions based upon essentially fair and just criminal proceedings, where full appeal and judicial review had been accorded and completed and such judgments had become final before the *Escobedo* decision was rendered?

Constitutional Provisions Involved

The relevant constitutional provision involved directly in the instant case is the Sixth Amendment to the United States Constitution which provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

There may also be involved in the instant case the interrelationship between the Sixth and Fifth Amendments to the United States Constitution. The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject, for the same offense, to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be witness against himself; nor to be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Statement of the Case

Petitioners-Appellants were indicted for murder on March 30, 1961. They were tried and convicted before the Essex County Court on July 8, 1961, and their appeals to the New Jersey Supreme Court were completed on January 21, 1963. *State* v. *LaPierre*, 39 N. J. 156 (1963). The

avenues of direct appeal having been exhausted, they thereafter sought issuance of writs of habeas corpus. On February 13, 1964, this was denied to them by the United States District Court for the District of New Jersey, and petitioners appealed to the Third Circuit. *Escobedo* v. *Illinois*, 378 U. S. 478 was decided on June 22, 1964. The Third Circuit Court of Appeals entered an order in the instant matter, reversing the District Court on May 20, 1965.

On May 26, 1965, the County Prosecutor of Essex County petitioned this Court for rehearing. Thereafter on June 11, 1965, the Attorney General of the State of New Jersey petitioned for leave to intervene as *amicus curiae*. On June 23, 1965, an order was entered directing the Attorney General to file a typewritten brief in support of the relief he sought within 20 days, and to set forth his reasons, with supporting authorities for concluding that the decision of the court handed down herein on May 20, 1965, was in error. On October 13, 1965 the court denied the petition for rehearing.

Reasons for Granting a Writ of Certiorari

1. The decision below involved an unwarranted expansion of the rule of law set forth in *Escobedo* v. *Illinois*.

2. The decision below in its extension of the *Escobedo* v. *Illinois* rule has decided novel and important questions of constitutional law, which have not heretofore been determined by this Court.

3. The *sub silentio* implied retroactive treatment accorded *Escobedo* v. *Illinois* in the instant case by the court below constitutes a decision of an important and difficult question of Federal constitutional law which has not been, but should be, determined by this Court.

4. An important and unsettled question of constitutional law as to the application of the assistance of counsel provision of the Sixth Amendment and the application and interrelationship of the Fifth Amendment during police questioning requires review of the decision below.

5. Recognition of the importance of the issues contained herein has been signaled by the granting of *certiorari* in cases involving similar issues as those here presented and *certiorari* should likewise be granted in this case to afford a complete and exhaustive treatment of this vital area of the criminal law.

6. Conflicting decisions on the application of the rule of law of *Escobedo* v. *Illinois* to factual circumstances and on the retrospective effect of *Escobedo* exists among Courts of Appeals of the United States, and among State Supreme Courts.

7. Confusion and conflict exist within the Third Judicial Circuit on both the scope and retroactivity of *Escobedo* v. *Illinois* so as to require review by this Court.

POINT I

The decision rendered by the Third Circuit Court of Appeals involved an erroneous application and expansion of the Sixth Amendment to the United States Constitution as expressed by this Court in *Escobedo* v. *Illinois* and has thus established a new rule of law and settled an important issue of Federal Constitutional Law which has not been, but should be, determined by this Court.

We are here confronted with the use and admissibility in evidence in criminal proceedings of voluntary confessions. The court below considered carefully whether the confes-

sions of Frank Bisignano and Anthony Russo had been coerced. In its examination of the voluntariness of their confessions, it treated claims of both physical and psychological coercion. The court rejected the arguments that the confessions were involuntarily obtained and found them to be uncoerced and voluntary. The confessions were found to be voluntary by the New Jersey Supreme Court, *State* v. *LaPierre*, 39 N. J. 156 (1963), and this question was presumably passed by this Court in denying a Writ of Certiorari, *Bisignano* v. *New Jersey*, 374 U. S. 852 (1963).

Despite the fact that the confessions were entirely voluntary, the court below reversed the convictions on the ground that the confessions were obtained in violation of the defendants' constitutional right to counsel under the Sixth Amendment to the United States Constitution. Thus, in our opinion, for the first time the Federal Circuit Court of Appeals gave, as a separate and independent reason for rejecting an otherwise voluntary and trustworthy confession in a criminal proceeding, the Sixth Amendment.

The Court of Appeals in holding that the confessions were inadmissible relied on the following factors: (1) neither Russo nor Bisignano were at any time, prior to the signing of their confessions, informed that they had a right to remain silent, (2) the defendants were not advised that they had a right to counsel, and (3) they were not told that anything they said could be used against them (P6a).

The opinion of the court below discusses *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Massiah* v. *United States*, 377 U. S. 201 (1964); and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). Ostensibly, principal reliance was placed upon this court's opinion in *Escobedo* v. *Illinois, supra*. In prac-

tical effect, however, the court below expanded this Court's holding in *Escobedo* to establish an absolute rule that *any* confession would be inadmissible which is obtained without counsel present wherein defendant has not been advised of his right to counsel, of his right to remain silent and of his right to be informed that any statements elicited from him could be used against him, without regard to other countervailing circumstances indicating that the defendant had not been denied essential due process.

It is strongly urged that this expansion and extended application is not called for by *Escobedo,* is unsound, and the Court of Appeals was, therefore, in error.

The salient facts in *Escobedo* should be firmly in mind in order to understand fully its import in the case *sub judice.* The defendant in *Escobedo* was a 22 year old male of Mexican extraction with no prior record with the police, who was arrested on January 20, 1960 in connection with the fatal shooting of his brother-in-law. He was released the same day at 5:00 P.M. by reason of a writ of habeas corpus obtained by his attorney. Danny Escobedo was rearrested on January 30 at 9:00 P.M. and was informed, while en route to the police station, by detectives that "they had us pretty well, up pretty tight and we may as well admit to this crime." At that point in time, defendant Escobedo requested counsel. Upon arrival at the police station, defendant again requested to see his counsel, but was denied the opportunity to do so. In fact, defendant's attorney arrived at the police station between 9:30 and 10:00 P.M. and requested to see his client, but was denied permission to do so. During the course of interrogation, Officer Montejano, who grew up in defendant's neighborhood, and who spoke Spanish, interrogated defendant. For the first time, defendant admitted his complicity in the murder of his brother-in-law.

Notwithstanding repeated requests by both the accused and his retained lawyer, no opportunity for consultation through the course of the entire interrogation was afforded. At one point, the accused and his attorney came into each other's view for a few moments, but the attorney was quickly ushered away. *Escobedo* v. *Illinois, supra,* at p. 481. Furthermore, Escobedo's lawyer was advised by the police that he could not see his client until they were through interrogating.

Confronted with these facts, this Court concluded:

> "We hold, therefore, that where, *as here,* the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright,* 372 U. S., at 342, 83 S. Ct., at 795 and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." 378 U. S. at p. 491. (Emphasis added.)

The Court later restated its position:

> "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system beings to operate, and, *under*

> *the circumstances here,* the accused must be permitted to consult with his lawyer.'' 378 U. S. at p. 492. (Emphasis added.)

Thus, while *Escobedo* clearly extends the Sixth Amendment right to counsel to the period when the focus of prosecution has turned upon the suspect, whether or not formal charges have been made, the test of whether the right to counsel has been denied depends upon whether due process has been extended to the defendant. This in turn calls for a careful review of the factual circumstances surrounding the alleged claim of infringement of the right to counsel. In failing to assess the totality of relevant circumstances preceding, surrounding and following the voluntary confessions, the court below, in our opinion, committed error.

The totality of the circumstances in the instant case indicate that there was no denial of due process, and that the right had not yet attached under the Sixth Amendment. Therefore, it cannot be said that defendants had been denied their constitutional right to counsel.

Frank Bisignano, age 22, was brought to police headquarters at 11:15 A.M., on March 16, 1961. The evening before, he had visited his wife and Russo's girl friend to construct an alibi. His statement admitting complicity was rendered that afternoon and was reduced to writing and concluded by 6:30 P.M.

Anthony Russo, age 21, had been wounded and in the early morning hours had been taken to Martland Medical Center. Initially, Russo refused permission for an operation to remove the bullet, but subsequently, on the 17th, he agreed to the operation. Shortly after the operation, defendant Russo gave an oral statement admitting to his participation in the attempted robbery and murder of

Joseph Hagel, the off-duty policemen, at Hahn's Tavern in Newark, New Jersey. On March 23rd he was taken from the hospital to Newark police headquarters where he gave a written statement reflecting his previous oral statements.

In the instant case there were no efforts, direct or indirect, concerted or general, to deny defendants any opportunity to confer with an attorney or, for that matter, with friends, relatives or anyone else. The defendants in the instant case were well attuned to police procedure and were court-wary individuals. Bisignano was on parole following conviction for grand larceny and Russo was awaiting sentence for armed robbery. Neither of these defendants could be said to be unfamiliar with law enforcement procedures. In fact, Russo evidenced his sense of legal self-preservation by refusing to allow a bullet to be removed from his arm for fear that it would implicate him in the crime. If Russo had the cunning not to have the incriminating bullet removed, *a fortiori* he certainly possessed the intelligence not to incriminate himself by his own statement unless he were of a free will to do so. Any hint moreover that their respective confessions were anything less than voluntary is dispelled by their reenactment of the crime. In short, there was no untoward conduct against the defendants on the part of the police and no lack of essential fair play.

These circumstances stand in sharp relief against the background of *Escobedo*. The flagrant abuse which occurred in *Escobedo* in regard to the adamant refusal to permit the defendant to consult with his attorney despite his repeated requests, the state of isolation and helplessness to which Escobedo had been reduced, and the continued and designed conduct of the police to keep the attorney away from the defendant in the course of interro-

gation are absent in the present case. In *Escobedo* there was, in every sense of the word, a *denial* of counsel and this factor, totally missing in the case *sub judice*, demonstrates its inapplicability herein. The crucial test set forth in *Escobedo*, to measure the denial of assistance of counsel in the context of the total circumstances, indicates forcibly that no constitutional deprivation to the right to counsel occurred in the instant case.

It is to be emphasized and reiterated that both defendants in the case *sub judice* were found to have given uncoerced confessions under Fifth Amendment standards. Although this Court in *Escobedo* found that the denial of counsel constituted a violation of the Sixth Amendment, its approach to and resolution of the legal issue recognized implicitly the applicability of Fifth Amendment standards. Obviously, this Court was satisfied under the total circumstances surrounding the arrests and interrogation of the accused that there was a denial of fundamental justice and fairness, an absence of due process, crystallized specifically in the failure to accord the accused the assistance of his already retained counsel and for that reason the right to counsel at criminal trial guaranteed by the Sixth Amendment, as required by *Gideon* v. *Wainwright*, *supra*, was rendered nugatory.

The *Escobedo* decision, examined critically in the light of the particular facts, blends the ingredients of both the Fifth and Sixth Amendments into a single formulation in ascertaining whether the absence of counsel in *pre*-judicial proceedings attains constitutional stature. As previously noted, this Court in *Escobedo* considered several important relevant factors in determining whether the accused had in fact been denied access to counsel and in assessing the impact of such denial. Such factors, all of the relevant circumstances, must be examined and weighed to determine,

as a matter of fundamental justice and fair play, whether there has been a *constitutional denial* of counsel.

If *Escobedo* combines, as we strongly assert it does the elements of the Fifth and Sixth Amendments in considering whether there has been a constitutional denial of counsel, it is vigorously pressed that there has been no violation of the letter or spirit of constitutional rights and guarantees, *sub judice*. The court below in effect held that where the procedure had become accusatory, the mere failure to advise an accused of his right to counsel is *per se*, a violation of the Sixth Amendment whether or not a request had been made. This approach ignores completely the importance of all factual circumstances surrounding a confession and disregards completely any notions of constitutional due process. It is an unwarranted extension of *Escobedo* which decision indicates clearly that no single factor should be determinative.

It is difficult to consider how the failure to advise an accused of his right to counsel alone can become a self-sustaining, meaningful and workable rule in determining the attachment of the Sixth Amendment guarantee. If a particular suspect has been advised of his right to counsel, without more, this would not under all circumstances satisfy the constitutional requirement of assistance of counsel. Difficult and confusing problems would undoubtedly arise if a suspect did not thereafter actually request counsel. Thus there would be the problem of determining whether there had been an intelligent or voluntary waiver of such right, as where a person might later claim to have been under the influence of narcotics, or alcohol, or in a state of mental disorientation or emotional upset or of low mental capacity. It would put an undue burden on law enforcement officers to prove negatively that such factors were nonexistent and the waiver of counsel had been a sensible

one. Conversely an individual may be very much aware of his constitutional right to counsel from his prior exposure to criminal processes as in this case. If law enforcement officers, in the critical and emergent moments of detection and arrest, inadvertently fail to advise such person of his right to counsel, the suspect may adroitly void the use of any incriminating statement that he might make by taking advantage of such an omission. Or, problems might arise concerning whether or not arresting officers had a reasonable opportunity to advise a suspect of his right to counsel before the individual gratuitously furnished a damaging statement. Moreover a particular individual may be of such low mental capacity or other mental disability, although not apparently so, that the simple advice of his right to counsel might indeed be an empty gesture.

In short, the factor of advising an accused of his right to counsel is not of itself a meaningful criterion. The attachment of the Sixth Amendment guarantee should not hinge on this fact alone and, by isolating this factor into a solitary, hard and fast rule, a disservice may be rendered both to society and to the individual. In too many cases the cunning person from whom society needs protection may escape the pitfalls of effective prosecution and be freed to prey on society while the uneducated, gullible or hapless individual may be convicted and incarcerated without regard to fair play and due process.

The expansion of *Escobedo* effected by the court below, creating a novel point of law has a drastic impact on law enforcement. It gives rise inevitably to a parade of absurdities and impracticalities which will further compound the confusion in this area and confound the work of law enforcement officers at the critical moments of detection, arrest, and investigation up to arraignment.

If the *Escobedo* extension by the Third Circuit Court of Appeals becomes the operative law, policemen will have to engage in the most refined linedrawing and distinctions. They will be required to know, for example, the precise, magical moment at which to advise a suspect of his right to counsel in order not to imperil the elicitation of further evidence. Confusion may arise in situations where the detective or policeman may suspect the witness as the culprit but his supervising officer, a police chief, bureau head, district attorney or prosecutor may not have focused upon the witness as the accused. Or conversely, the policeman may consider the individual only as a material witness but his superiors may have already determined in their minds that this person is the prime suspect. Notwithstanding that statements elicited might be completely voluntary, there has been opportunity to obtain counsel and to confer with other persons, a prompt arraignment and, in general, judicial fair play accorded the defendant, prosecutions would be jeopardized by the new *Escobedo* rule of the court below.

Similar problems would also confront local law enforcement officers with regard to the types of statements involved. If confessions, admissions of guilt, may be excluded from evidence, what should be the rule with respect to other types of statements? Statements made without the presence of counsel, which are not admissions of guilt as such, but which may lead to inculpatory evidence which fastens guilt upon the declarant—such as the identification of objects, persons or the whereabouts of the potentional defendant at the time of the crime—may also be tainted under the application of the rigid test enunciated by the court below. Under the exclusionary rule recognized in other decisions, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *McDonald* v. *U. S.*, 335 U. S. 451 (1948), it would appear that

the fruits of such statements might not be utilized. It must occur, not infrequently, that a witness, while not confessing, might disclose to arresting officers his whereabouts at a critical time, or his ownership or possession of clothing, or automobile, or wallet or watch, or he might explain his relationship or familiarity with other persons, all of which may ultimately tie him into the crime. The sterilization of such evidence must necessarily fetter law enforcement.

Such considerations are only suggestive of the real and serious problems which will be engendered by an adoption of the Third Circuit Court of Appeals' rendition of the *Escobedo* case. They stress the point that where the focus has shifted from a general inquiry of an unsolved crime to the accusatory process, the Sixth Amendment applies absolutely. They then isolate the single factor of whether the accused has been advised of his right to counsel from the general criteria considered relevant by this Court in *Escobedo* and ignore the totality of the circumstances and the standards of constitutional due process which are implicit in *Escobedo*. It is this test of totality which should be applicable in assessing the impact and effect of absence of counsel in *pre*-judicial criminal proceedings.

The Court must look to all relevant circumstances surrounding the alleged constitutional deprivation to determine whether there has been a denial of the right to counsel in a constitutional sense. Where, as in *Escobedo*, the defendant has effectively asserted and claimed his right to counsel, has indeed retained counsel, has requested to see him and his counsel in turn is anxious to consult with his client, the pattern is one of deliberate, purposeful police interference with the accused's right to counsel which is tantamount to a denial of basic due process. There has, under such circumstances, occurred unquestionably a *denial* of the constitutional right to counsel. Yet to rule, as did

the court below, that voluntary admissions made during routine and necessary questioning immediately following a crime and arrest are inadmissible, where in no practical and meaningful sense there was an absence of fair play or due process or an actual denial of an asserted right to counsel, is to substitute a rigid and unrealistic test. It is in disregard of the total circumstances and concepts of due process which are the basic measure of the constitutional right. The unavoidable implication of such a test is to require, without fail, the presence of an attorney at all times in the police station, if not on the beat itself. In no other way could law enforcement officials overcome the insurmountable difficulties in utilizing material statements in the nature of confessions in the face of later claims that there had been no effective forewarning or no intelligent waiver. If, as noted in the accompanying Petition for a Writ of *Certiorari,* no attorney "worth his salt" would fail to advise his client "to shut up", courts must accept the ultimate fact that there will be no confessions available in criminal prosecutions.

The overriding importance of these problems and their prompt and effective resolution by this Court, especially in the light of increasing crime rates and social conditions prevalent in modern society, demand the full exposition of the issues and the opportunity to present arguments in depth to the end that neither this Court's decision in *Escobedo* nor sound policy dictates the severe curtailment or elimination of the use of confessions implicit in the decision of the court below. For these reasons, it is respectfully urged that full review of the instant case be accorded by this Court.

POINT II

Assuming that the Court below properly extended the ruling in *Escobedo* v. *Illinois* it should not be applied retroactively to criminal cases in which conviction and direct appellate review have been concluded.

With regard to the retroactive operation of *Escobedo* v. *Illinois*, as extended by the court below, we concur in the remarks as set forth in the Petition for Writ of *Certiorari*. We feel it appropriate, however, because of the magnitude of this issue to provide additional comment.

It might be said that *Escobedo* v. *Illinois, supra,* occupies a middle ground somewhere between *Gideon* v. *Wainwright, supra,* and *Linkleter* v. *Walker,* 381 U. S. 618 (1965). *Gideon* v. *Wainwright* held the right to counsel at trial must be applied retroactively while *Linkletter* v. *Walker* held that *Mapp* v. *Ohio, supra,* dealing with the use of illegally seized evidence would not be applied retroactively. Therefore the determination of retroactivity in *Escobedo* depends upon whether it is more akin to *Gideon* or to *Linkletter*.

Gideon, of course, dealt with the lack of participation of counsel at trial. Because of its similarity to *Escobedo* in that the right to counsel was extended to another critical stage of a criminal proceeding, it has deceptive appeal for an analogy. A syllogism could easily be formulated as follows: *Gideon* involved a lack of participation of counsel and was retroactively applied. *Escobedo* involved a lack of participation of counsel. Therefore, *Escobedo* should be applied retroactively. Simple logic, however, cannot control the result that should obtain. The fact that both *Gideon* and *Escobedo* deal with constitutional denial of the "assistance of counsel" under the Sixth Amendment does

not in and of itself put them in the same category for the purpose of retroactive application. There are substantial and important differences between these cases.

Underlying the rationale of the retroactive effect given to the *Gideon* case is the fundamental concept that every person is entitled to his day in court. *Gideon* had, in fact, less than his day in court when he was denied the right to counsel at his trial. Moreover, without the assistance of counsel an otherwise innocent defendant could "face the danger of conviction because he does not know how to establish his innocence." *Powell* v. *Alabama*, 287 U. S. 45, 68-69 (1932). The reliability of the judicial determination of guilt, where defendant was handicapped in his defense, was questionable. This inherent doubt necessarily clouds the result and cannot be dispelled.

> "*Gideon* expresses judicial realization that denial of counsel during judicial proceedings has the clear capacity to result in the conviction of a guiltless man." (*State* v. *Johnson*, 43 N. J. 572, 584 (1965)).

Gideon, therefore, achieved retroactive treatment. No other course of action, except to set aside the entire proceedings, could satisfactorily assure a correct or sound determination of guilt.

Linkletter v. *Walker*, *supra*, held that the *Mapp* v. *Ohio* rule, barring the use of illegally seized evidence at trial in the state courts, should not be applied retroactively. The Court recognized and emphasized that the purpose of the exclusionary rule was to deter untoward conduct of law enforcement officials in their quest for evidence and to guide within constitutional channels the actions of such officers in their enforcement of the criminal laws. A retroactive application of the rule in the particular case to set

aside the conviction would not have furthered its overall purpose of influencing in the future the attitude and conduct of law enforcement officers.

Additionally, if *Mapp* v. *Ohio, supra,* had been accorded retroactive application, the reopening of a multitude of cases would have been a reality. Many of the states prior to the *Mapp* decision were not following the exclusionary rule which was then made applicable to all the states through the Fourteenth Amendment. The law enforcement officials in the states were not on notice that what they might be doing by way of investigation and securing evidence was unconstitutional. In fact, they were justified in relying on *Wolf* v. *Colorado,* 338 U. S. 25 (1949), which held that the exclusionary rule did not apply to the states. *State* v. *Johnson, supra,* at p. 589.

Mapp, as noted, had the salutary effect of formulating a standard as to exclusion which could be followed by officers in the future. This effect, as just observed, would not be particularly enhanced by giving the *Mapp* rule application retrospectively in cases long since concluded.

The court in *Linkletter* also emphasized that the potential inaccuracy of the judicial result reached was not a present factor. Any doubts with respect to the correctness or fairness of the conviction could be assessed and resolved without setting aside the conviction. Thus, in that particular case, the defendants could be accorded full due process and were fully protected insofar as an accurate estimation could be made on all of the evidence in the record to establish whether or not they had actually committed the acts with which they were charged, without regard to the improperly secured evidence. There was no need, therefore, to set aside the conviction retroactively.

In *Gideon*, by way of contrast, the assistance of counsel to present a defense on behalf of an accrued during trial was considered to be so vital and indispensable that there could be no way to assess the effect of the lack of counsel and its impact on the final result. Hence the prior conviction had to be set aside.

Moreover, retroactive application in *Gideon* did not portend a holacaust in the administration of criminal justice. No overwhelming flood of relitigation and reopened proceedings was anticipated because many states had theretofore recognized a criminal defendant's right to counsel at trial in both capital and non-capital cases. Many states were already complying with the constitutional mandate of the Sixth Amendment as applied to the states through the Fourteenth Amendment, by furnishing counsel to the accused at the time of trial. See Israel, "*Gideon* v. *Wainwright: The 'Art of Overruling,'*" *The Supreme Court Review*, 211, 267-267 (1963). This was unlike the problems involved with respect to the use of unlawfully seized evidence, where the practical administration of justice would have been sorely strained if *Mapp* v. *Ohio* were accorded retroactive treatment. As the court in *Linkletter* stated:

> "Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial would not be available or if located, their memory would be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." *Linkletter* v. *Walker, supra*, pp. 637-638.

Since, as previously noted, many states had not before *Mapp* followed its edict, but rather tailored their practices

to the contrary standards of *Wolf* v. *Colorado, supra,* the court could well have anticipated a deluge of cases which would be released by a retroactive application of *Mapp.*

The *Linkletter* court set forth the guidelines by which the decision respecting retroactivity should be arrived at:

> ". . . we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation." *Linkletter* v. *Walker, supra,* at p. 629.

Measured against the test set forth in *Linkletter* and the court's approach and consequent results in both *Gideon* and *Linkletter,* it is submitted that the retroactivity of *Escobedo* v. *Illinois* finds its analogue in the *Linkletter* case.

In an *Escobedo* kind of situation the concern is directed at the right of counsel at the time of questioning and not at the trial level. The defendant is accorded his day in court and there is no fundamental unfairness with regard to the interest of the particular defendant at the trial which requires the judiciary to remedy a defect in the court proceedings. The court by holding *Gideon* retroactive was correcting that which could not be obviated but had to be erased because the conduct involved did not relate to law enforcement officials but to the judiciary, its own branch of government. In *Gideon* the court properly effected a self-policing measure.

In an *Escobedo* situation the retroactive application would not further the purpose of the rule. If the courts are concerned with sterilizing the police antechamber, i.e., to steer police tactics into a constitutional course with respect to interrogations and confessions, retroactivity would be inappropriate. See *People* v. *Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965).

The catastrophic effect on the administration of justice if an *Escobedo* case were held to be retroactive cannot be measured. When *Gideon* was decided only a few states still denied counsel to the accused at a trial in a noncapital case. See Israel, *Gideon* v. *Wainwright, The "Art" of Overruling, The Supreme Court Review, supra.* However, at the time *Escobedo* was decided, almost all the states permitted the introduction of voluntary confessions given, in the absence of counsel, during police investigation. *State* v. *Johnson, supra,* at p. 584. Criminal cases from nearly every jurisdiction in the country would have to be reopened. *In re Lopez,* 42 Cal. Rptr. 188, 398 P. 2d 380, 390 (1965). Thus, the guidelines established by this court in *Linkletter* v. *Walker, supra,* militate strongly against the retroactive application of *Escobedo* or *Escobedo* as extended by the court below.

POINT III

The decision below conflicts with that of other federal and state courts in regard to both the courts interpretation of *Escobedo* v. *Illinois* and its retroactive effect.

The decision of the Third Circuit Court of Appeals in the instant case is in clear contradiction to that of other federal and state tribunals in regard to both the interpretation of the rule of law in *Escobedo* and the retroactive effect to be given to that decision.

The Fourth, Fifth and Seventh Circuits and various States courts have held that both a request and denial of the right to counsel are prerequisites for the operation of the *Escobedo* standard. *Davis* v. *State of No. Carolina,* 339 F. 2d 770 (4th Cir. 1964); *Edwards* v. *Holman,* 342 F.

2d 679 (5th Cir. 1965); *United States* v. *Childress*, 347 F. 2d 448 (7th Cir. 1965) and *United States, ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837 (7th Cir. 1964) *cert. denied* 379 U. S. 984 (1965); *State* v. *Coleman*, 46 N. J. 16, — A. 2d— (1965); *Slugris* v. *Maryland*, 235 Md. 343, 201 A. 2d 681 (1964); *Illinois* v. *Hartgreaves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964) *cert. denied* 380 U. S. 961 (1965). The Second Circuit, in two recently decided cases, held that *Escobedo* did not require that a suspect be advised of his right to silence and of his right to counsel prior to questioning or of making any statement to the police. *United States* v. *Robinson*, —— F. 2d ——— (2nd Cir. Nov. 22, 1965); *United States* v. *Cone*, ——— F. 2d ——— (2nd Cir. Nov. 22, 1965). Additionally, on December 2, 1965, the Second Circuit ruled that a confession obtained during questioning wherein there had been no request for counsel would not *per se* be a constitutional violation. The court decided that the circumstances of each individual case must be carefully examined and whether a confession has been obtained in violation of the constitutional right to counsel will depend upon the particular patterns of fact. *United States* v. *Drummond*, —— F. 2d ——— (2nd Cir. Dec. 2, 1965). See also *Cephus* v. *United States*, ——— F. 2d ——— (D. C. Circuit 1965).

State and federal courts are equally split as to the retroactive effect of *Escobedo*. While the Third Circuit in the present case, by implication, construed *Escobedo* in a retroactive manner, the Seventh Circuit in *Walden* v. *Pate*, —— F. 2nd ——— (7th Cir. 1965) ruled that *Escobedo* was not to be applied retroactively in a post conviction proceeding. See also *United States, ex rel. Conroy* v. *Pate*, 240 F. Supp. 237 (N. D. Ill. 1965); *Timmons* v. *Peyton*, 240 F. Supp. 749 (E. D. Vir. 1965); *State* v. *Johnson*, 43 N. J. 572 (1965); *In re Lopez*, 43 Cal. Rptr. 188, 398 P. 2d 380 (1965); *Commonwealth* v. *Negri*, —— Pa. ———, 213 A. 2d 670 (1965).

The gravity of the situation is particularly apparent within the Third Circuit. While the New Jersey Supreme Court as a result of its decision in *State* v. *Coleman, supra,* has decided that a request for counsel and the denial thereof is necessary for the operation of the *Escobedo* test, a defendant, by reason of the instant decision is free to walk across the street to the federal court house and obtain a different ruling. The decision in *State* v. *Johnson, supra,* intensifies the problem in regard to retroactivity. Even more absured is the situation which prevails in Pennsylvania, where the state courts, for the purposes of uniformity, have agreed to conform to the Third Circuit's interpretation of *Escobedo,* but refuse to apply it retroactively. *Commonwealth* v. *Negri, supra.*

The instant case, therefore, invites this court to exercise its reviewing power to unify and reconcile those conflicting and confusing interpretations accorded to *Escobedo* v. *Illinois, supra.* The confusion generated by the various state and federal courts filters down to making the task of law enforcement an impossible one. Prosecutors' staffs are unable to determine when a confession is questionable. When viewed in light of law enforcement officials' duty to represent and protect society, the doubt that prevails as to when or when not a confession is admissible prevents proper performance of their sworn duties.

Uncertainty in the prosecution of criminal cases is complemented by doubts as to what constitutes constitutional law enforcement in the confession area. Certainly if the prosecutors are sorely tried to define constitutionally permissible methods of questioning, the law enforcement arm, *i.e.*, the policeman on the beat, cannot be held accountable for the knowledge that his superior does not possess.

It is submitted that there is an immediate need for clarity to be brought to bear on the problems spawned by the decision in *Escobedo.*

CONCLUSION

For the reasons discussed herein, it is respectfully urged that *certiorari* should issue to review the decision of the court below.

Respectfully submitted,

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